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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE,
TENTH JUDICIAL DISTRICT,

Petitioner,

v.

ALFRED KOFFLER and WILLIAM HENRY HARRISON, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Question Presented

Whether the Court of Appeals of the State of New York erred in its extension of this Court's rulings in *Bates, Ohralik* and *Primus* by permitting direct mail solicitation by attorneys for pecuniary gain where the Appellate Division, Second Department of the Supreme Court of the State of New York, the body empowered by statute to regulate the conduct of attorneys, had prohibited it.

Petitioner, the Joint Bar Association Grievance Committee, Tenth Judicial District, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

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Opinion Below

The opinion of the Court of Appeals of the State of New York (Meyer, J.) (Appendix, infra) is reported at 51 N.Y. 2d 140.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on October 31, 1980 (Appendix, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Constitutional and Statutory Provisions Involved

Constitutional Provision:

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions:

Section 90(2) of the New York Judiciary Law:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice * * *.

Section 479 of the New York Judiciary Law:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render

> legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

Rule:

Disciplinary Rule 2-103(A) of the Code of Professional Responsibility:

> A lawyer shall not recommend employment, as a private practioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

Statement of the Case

In August, 1977, the respondent attorneys, Koffler and Harrison, placed an advetisement in the real estate section of *Newsday,* a daily newspaper of large circulation in Suffolk, Nassau and Queens Counties. In substance it stated that the legal fee of the respondents for real estate closings, including contracts, was $235.00 and it listed the telephone numbers at which they could be reached.

On August 24, 1977 and thereafter, the law firm of respondents Koffler and Harrison mailed letters to homeowners and real estate brokers. These letters are set forth in Appendix B.

Between August 24 and October 24, 1977, respondents mailed approximately 7,500 such letters to homeowners and several hundred similar letters to real estate brokers.

On September 15, 1977, the Joint Bar Association Grievance Committee, Tenth Judicial District (the Committee) wrote to respondents enclosing copies of the two letters and invited them to submit their comments thereon. On September 23, 1977, respondents acknowledged that they had sent the letters and stated that "We have endeavored to avoid that which is prohibited by the recent Supreme Court decision on advertising by lawyers." By order dated February 8, 1978, the Appellate Division,

Second Department of the Supreme Court of the State of New York authorized the institution of a disciplinary proceeding. The Committee initiated the proceeding by a notice of petition dated April 7, 1978. The petition alleged that respondents were "guilty of illegal and unethical practices and professional misconduct" because of their "numerous direct solicitations for legal clients in violation of the Code of Professional Responsibility as adopted by the New York State Bar Association and Section 479 of the Judiciary Law."

Respondents' answer attacked the constitutionality of the statute and rule insofar as they applied to mail solicitations. It also alleged as an affirmative defense that, "[i]n preparing and mailing the letters * * * the respondents relied in good faith upon the decision of the United States Supreme Court in *Bates* v. *State Bar of Arizona*, 433 US 350." Their answer also asserted that the letters were "in full compliance with the guidelines for advertising adopted by the New York State Bar Association and approved by the Appellate Division, Second Department."

The Appellate Division referred the proceeding to Honorable John F. Scileppi, a retired Judge of the Court of Appeals, to hear and to report upon the issues thus raised.

On April 11, 1979, the Referee submitted his report, which concluded that the respondents' conduct violated the aforestated statute and section of the Code of Professional Responsibility.

On October 1, 1979, the Appellate Division confirmed the Referee's report (*Matter of Koffler*, 70 A.D.2d 252). The Court, after determining that the letters to the homeowners sought to establish a relationship of systematic solicitation, wholly independent of any pre-existing personal relationship stated, at page 272:

> "This letter, which is insulated from the commercial marketplace of competitive advertising, goes far

beyond the allowable type of restrained advertising aimed at giving public notice of the availability of legal services which was approved of in *Bates* v. *State Bar of Arizona* (433 U.S. 350).

"Nor may it be doubted that solicitation by mail may be proscribed. Section 479 of the Judiciary Law and the related Disciplinary Rules are prophylactic in nature. Regardless of the particular abuse in the present case, the potential for abuse and the detrimental effects resulting from the use of commercial speech characterized by the subject letters are contrary to the important governmental interest in prohibiting certain forms of solicitation."

In an opinion dated October 21, 1980 (51 N.Y.2d 140), the New York Court of Appeals unanimously reversed the unanimous decision of the Appellate Division.

Reasons for Granting the Writ

Prior to the determination by the New York State Court of Appeals, but after this Court's decision in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447 (1978) and *In re Primus,* 436 U.S. 412 (1978), the question of direct mail solicitation by attorneys seeking to establish a prepaid legal services plan, was considered by the Supreme Court of Louisiana in *Allison and Perrone* v. *Louisiana State Bar Association,* 362 So. 2d 489 (1978). There the Court upheld the constitutionality of the state's ban on solicitation by attorneys for pecuniary gain. In its opinion, the Court said at page 496:

"The necessary inference from the opinion in the *Primus* case is that the result would have been different if the lawyer's income was dependent on the outcome of the litigation."

The Supreme Court of Kentucky, faced with attorneys who had mailed letters to real estate brokers solicitating real estate transactions, ruled in *Kentucky Bar Association* v. *Stuart and Thompson,* 568 S.W. 2d 933 (1978), that the conduct of the attorneys was constitutionally permissible under *Bates.* Neither of the aforementioned cases were appealed to this Court. A matter closely paralleling the New York, Kentucky and Louisiana cases is pending in the Supreme Court of Minnesota, *Matter of Appert and Pyle,* File No. 848803. This matter involves letters of solicitation sent by attorneys to women whom they apparently believed might have suffered an injury due to the use of an inter-uterine contraceptive device. Upon information and belief, a decision is anticipated some time in March, 1981.

The particular conduct ruled permissible by the New York Court of Appeals has not been sanctiond in the cases decided by this Court. Mr. Justice Marshall, in his concurring decision in *Ohralik* and *Primus,* stated at page 471:

> "Our holdings today deal only with situations at opposite poles of the problem of attorney solicitation. In their aftermath, courts and professional associations may reasonably be expected to look to these opinions for guidance in redrafting the disciplinary rules that must apply across a spectrum of activities ranging from clearly protected speech to clearly proscribable conduct. A large number of situations falling between the poles represented by the instant facts will doubtless occur."

This case falls between the poles described by Justice Marshall. The solicitation involved was not "in person", as was proscribed in *Ohralik,* nor does it involve a nonprofit organization and the political and associational overtones, as was the case in *Primus.* The present case con-

cerns the targeting of a specific group by attorneys having no previous relationship with the group and the soliciting of a specific legal matter by the attorneys for their personal pecuniary gain.

In the case at Bar, the Appellate Division unanimously held that the State's interest in protecting the public by prophylactic regulation of the evils associated with attorney solicitation justified proscribing targeted direct mailings and the Court of Appeals unanimously reversed that ruling.

Such activity by attorneys was proscribed by Section 479 of the New York Judiciary Law and DR 2-103(A) of the Code of Professional Responsibility. Rules for the Conduct of Attorneys drafted in response to *Bates* continued this proscription. The decision of the Court of Appeals found the Appellate Division's distinction between advertising and solicitation to be artificial and the proscription contained in the aforementioned statute and rule to be unconstitutional. The Appellate Division, which is the body empowered by Section 90(2) of the New York Judiciary Law, has thus been stripped of its ability to regulate solicitation by attorneys prophalactically and is left with the unsatisfactory task of disciplining the more flagrant abuses after they occur.

Solicitation by attorneys currently enjoys constitutional protection in New York and Kentucky, but not in Louisiana, nor presumably in the many other states where DR 2-103(A) of the Code of Professional Responsibility remains in effect. Minnesota will state its position shortly. Undoubtedly, the High Courts of the other states will be confronting this constitutional question. It is, therefore, important for this Court to resolve the conflict between the states by entertaining this case which falls between the poles of *Ohralik* and *Primus*.

CONCLUSION

It is respectfully submitted that the petiiton for a writ of certiorari should be granted.

Dated: Mineola, New York
January 14, 1981

Respectfully submitted,

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APPENDIX A

Decision and Order of the Court of Appeals of the State of New York (October 21, 1980) 51 N.Y. 2d 140, 32 N.Y.S. 2d 872.

At a session of the Court held at Court of Appeals Hall in the City of Albany on the twenty-first day of October, 1980.

Present, Hon. Lawrence Cooke, Chief Judge, presiding.

No. 433

In the Matter of Alfred S. Koffler and William Henry Harrison, Jr., Attorneys and Counselors-at-Law,

Appellants,

v.

Joint Bar Association Grievance Committee for the Tenth Judicial District,

Respondent.

Opinion of the Court

MEYER, J.

[1] Direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed. The Appellat Division's contrary holding, predicated upon an artificial distinction between solicitation and advertising should, therefore, be reversed, without costs.

Appendix A.

[2]The appeal comes before us as of right, on constitutional grounds. It is from an order of the Appellate Division, made in a disciplinary proceeding, which confirmd the report of the referee that respondents-appellants Koffier and Harrison ((hereafter respondents)) had violated section 479 of the Judiciary Law and DR 2-103 (A) of the Code of Professional Responsibility, but which, finding that respondents had apparently acted in good faith, imposed no sanction.[1]

The proceeding, bgun by the Joint Bar Association Grievance Committee, Tnth Judicial District (hereafter Committee), charged that respondents, in violation of section 479 of the Judiciary Law and the Code of Professional Responsibility, caused to be mailed between August 24, 1977 and October 24, 1977, to approximately 7,500 individual real property owners a letter on respondents' legal stationery which solicited the addresses to use respondents' services in connection with the sale of real property, and during the same period caused to be mailed to a number of real estate brokers a letter on respondents' legal stationery soliciting the brokers to refer clients to respondents in connection with the purchase or sale of real property. The texts of the two letters are set forth in the Appellate Division's opinion (70 AD2d 252, 254-255) and need not b repeated here. The Appellate Division noted (*id.*, at p. 256) respondent Koffler's testimony that the results of their *Newsday* advertisement, reproduced as part of their letter, " 'were negligible' " and that respondents " 'felt if we could direct our advertising specifically at the person who was interested in the sale of a house,—for example, instead of just advertising in a paper with a general circulation—we might be able to get better results

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[1] [2] Absence of a sanction does not affect respondents' right of appeal from the confirmed finding of violation (CPLR 5601, subd [b], par 1).

and do the mass production idea that we had.'" He also testified that the firm did about 200 closings at the fee stated in the letter.

By their answer and by stipulation made before the referee respondents admitted sending the letters and the text of them. The answer, however, alleged as a defense that both facially and as applied the Judiciary Law and the code violate the First and Fourteenth Amendments to the United States Constitution, that respondents acted in good faith reliance on the decision of the Supreme Court in *Bates* v. *State Bar of Ariz.* (433 US 350), decided June 27, 1977, and that they have acted and are continuing to act in compliance with the guidelines for advertising adopted by the New York State Bar Association and approved by the Appellate Division, Second Department.

[1, 3] Since overbreadth analysis is not applicable to commercial speech (*Ohralik* v. *Ohio State Bar Assn.*, 436 US 447, 462, n 20; *People* v. *Mobil Oil Corp.*, 48 NY2d 192, 199), respondents are limited to contesting the invalidity of the statute and code provisions as applied to them. The referee concluded that respondents had violated the Judiciary Law and DR 2-103 (A) of the code because their communications constituted constitutionally unprotected solicitation rather than advertising. In so finding he made no distinction between the letter to homeowners and the letter to brokers, nor had any distinction between them been suggested by the Committee's presentation at the hearing before the referee. Confirming, the Appellate Division, without reaching the question whether all mailing to nonclients is proscribed, held the statute and DR 2-103 (A) "constitutional insofar as they ban solicitation of legal business by mail as well as in person" (70 AD 2d 252, 274) but, except for a passing footnote reference to the potential conflict of interest that could be involved in the solicitation of real estate brokers to refer clients to respondents, like-

wise did not differentiate between the two letters. For the reasons hereafter set forth we conclude that neither statute nor code provision can constitutionally prohibit advertising of attorneys' services by direct mail addressed to potential clients. We do not, however, pass upon direct mail solicitation of clients through materials addressed to third persons, preferring to leave determination of that question, distinguishable as it is in a number of ways from direct client solicitation by letter,[2] for a matter in which a more complete record has been made and there has been more extensive consideration by the Appellate Division, in which is vested primary jurisdiction in matters of discipline.

While prohibitions against solicitation of legal business by or for attorneys have ancient roots (Note, Attorney Solicitation of Clients, 7 Hofstra LR 755, 757), their constitutionality has come into question only recently. The proscriptions the Committee seeks to enforce against respondents are contained in section 479 of the Judiciary Law, which read in 1977 and still reads: "It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements", and section DR 2-103 (A) of the Code of Professional Responsibility, which as it read at the time respondents' letter

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[2] For example, third person mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are, therefore, much closer to speech of the type *Ohralik* v. *Ohio State Bar Assn.* (436 US 447) has held can be proscribed (cf. *Matter of State Bar Grievance Administrator* v. *Jacques*, 407 Mich 26, 51 [COLEMAN, Ch. J., dissenting]).

to homeowners was circulated, provided: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."[3] Since to recommend one's self for employment is to solicit employment, the two provisions are, at least in the context of the present proceeding, coextensive.

[1] We disagree, however, with the Appellate Division's conclusion that the solicitation that those provisions condemn can be differentiated from constitutionally protected commercial speech simply by categorizing the former as solicitation and the latter as advertising. The Supreme Court has said so in so many words, overruling in *NA.A.CP.* v. *Button* (371 US 415, 429), the contention that "solicitation" is wholly outside the area of First Amend-

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[3] On April 29, 1978, DR 2-103 was amended. Subdivisions (A) and (F) of the amended provision read as follows:

"(A) A lawyer shall not solicit employment as a private practioner of himself or herself, a partner or an associate to [*sic*] a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision."

"(F) Advertising permitted under DR 2-101 shall not be deemed in violation of any provision of this Diciplinary Rule." On March 1, 1978, the Appellate Division, Second Department, implemented its rule 691.22, originally filed in 1976 (22 NYCRR 691.22). The rule is entitled "Advertising and publicity by attorneys" and, in pertinent part, permits public communications that are not false or deceptive and that do not include puffrey or claims concerning quality of services that cannot be measured or verified, and requires that advertised fees be maintained for specified periods. DR-2-101, referred to in DR 2-103 (A) and (F), is, except for the substitution of "lawyer" for "attorney", identical with rule 691.22. When respondents' letters were sent, however, the guidelines were not in effect.

ment protection, and declaring in *Bigelow* v. *Virginia* (421 US 809, 826), that: "Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." (See, also, *Matter of Madsen,* 68 Ill 2d 472, 478.)

Semantically, of course, there is a difference. Not all solicitation is advrtising, though all advertising either implicitly or explicitly involves solicitation involves solicitation. To "solicit" means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing (Webster's Third New International Dictionary, p. 2169; Black's Law Dictionary [5th ed], pp. 1248-1249), while "advertising" is the calling of information to the attention of the public, by whatever means (Webster's, p. 31; Black's, p. 50). To outlaw the use of letters, the content of which does not violate DR 2-101, addressed to those most likely to be in need of legal services, because in addition to "advertising" th nature of the service and its price the letters implicitly or explicitly suggest employment of the writer to perform those services, ignores the strong societal and individual interest in the fre edissmination of truthful pric einformation as a means of assuring informed and r liable decision in our free enterprise system, about which both the Supreme Court (*Bates* v. *State Bar of Ariz.,* 433 US 350, 364, *supra*) and we (*People* v. *Mobil Oil Corp.,* 48 NY2d 192, 200, *supra*) have had occasion to comment, and can only be productive of confusion for the profession (see Freedman, Lawyer's Ethics in an Adversary System, ch 10). To do so, moreover, is to suggest that there is necessarily something improper about an attorney's desire to earn a fee, ond that there is something different about the legal profession that makes direct mail adver-

tising improper though it would not be for other businesses or professions and though indirect forms of advertising are not improper even for the legal profession, notwithstanding the contrary indications in the writings of both the Supreme Court (*Bates, supra,* at pp. 368-369, 371-372; *Pittsburgh Press Co.* v. *Human Relations Comm.,* 413 US 376, 385) and of our court (*Matter of Gordon,* 48 NY2d 266, 272).

Turning, then to consideration of the provisions in question in the context of the case law on commercial speech, we note that the Supreme Court of Kentucky has upheld letter solicitation of clients in real estate transactions (*Kentucky Bar Assn.* v. *Stuart,* 568 SW2d 933 [Ky]; see, also, the reference to "mail circulations" in the concurring in-part opn of Mr. Justice POWELL in *Bates* v. *State Bar of Ariz.,* 433 US 350, 402, n 12, *supra*), but that none of the United States Supreme Court"s pronouncements in cases concerned with lawyer-client speech is directly in point. *Matter of Primus* (436 US 412) dealt with lawyer-client speech but at the political and associational level, not here involved, and while it held protected letter solicitation of a prospective client, did so on the basis (see 436 US, at p. 431) of the more generous protection accorded such speech. *Bates* v. *State Bar of Ariz.* (*supra*) though it held protected price advertising by lawyers, did so with respect to the more indirect method of newspaper advertising. *Ohralik* v. *Ohio State Bar Assn.* (436 US 447, *supra*), while it held constitutional a restriction on in-person solicitation of accident victims while in the hospital, did so one the possibility of everreaching inherent in such a person-to-person confrontation.

Those cases are nonetheless helpful in the determination of the instant appeal, as is the more structured analysis for commercial speech cases stated by the Supreme Court in its most recent opinion on the subject, *Central Hudson*

Gas v. *Public Serv. Comm.* (447 US —, 100 S Ct 2343). In that case the court defined commercial speech as "expression related solely to the economic interest of the speaker and its audience" (447 US, at p. —, 100 S Ct, at p. 2349), a definition within which respondents' letter to homeowners comfortably fits, and posited a four-part analysis (447 US, at p. —, 100 S Ct, at p. 2351): (1)) Is it misleading or related to unlawful activity? (2) Are the Government interests sought to be protected substantian? (3) How directly does the regulation advance those interests? (4) Is there a less restrictive alternative?

The Committee did not claim in its petition that respondents' letter was either misleading or related to unlawful activity. At the hearing before the referee, its counsel rested after putting on record the stipulation by which respondents' sending of the letters and the content of them was put in evidence and cross-examined respondents only to show that they were commercially motivated. The Appellate Division (70 AD2d, at p. 274, n 5) characterized as a questionable tactic the statement in the letter that "'We understand that you are selling your home'", noting that the mailing of 7,500 such letters "would apparently indicate that they [respondents] had no such understanding at all", but made no finding that the letter was misleading, as, indeed, on the record it could not have, there being nothing in the record to indicate how the list of addressees was compiled by respondents. We conclude that the letter to homeowners was neither misleading nor did it relate to unlawful activity.[4]

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[4] Of course, the Committee in seeking to hav respondents disciplined for violating the Judiciary Law is, in one sense, urging that respondents acted unlawfully, but that is not the activity (sale of a house) to which the letter related.

Appendix A.

The interests sought to be protected are identified in the Appellate Division opinion (70 AD2d, at p. 274) and in the Committee's brief as the potentials[5] for deception, for invasion of privacy, for overcommercialization of the profession and for conflict of interest. *Bates, Ohralik* and *Primus* establish that these are legitimate and important State interests.

There is, however, obvious tension between these interests and the societal interest, already noted, in the free dissemination of truthful price information in order to assure "informed and reliable decision making" (*Bates,* 433 US 350, 364, *supra*). It is in the light of that tension that the directness of relation of regulation to purpose is to be considered. So considered, the only interest concerning which it can be said that there is a sufficiently direct relationship is prevention of deception. The Committee does not suggest how conflict of interest can arise through direct mail client solicitation or how the proscription of such solicitation will "help to avoid situations where the lawyer's exercise of judgment on behalf of a client will be clouded by his own pecuniary self-interest", as its brief suggests, and no such possibility occurs to us (cf. Note, 81 Yale LJ 1181, 1187).

The overcommercialization potential of direct mail advertising is now sufficiently controlled by the Appellate Division's rule 699.12 and DR 2-101, the constitutionality of which have not been questioned in this proceeding. Though those controls were not in effect when respondents mailed their letters, the connection between professional

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[5] It is the potential that is to be considered in determining constitutionality (*Ohralik* v. *Ohio State Bar Assn.*, 436 US 447, 464, *supra*), although respondents could not be disciplined unless their "activity in fact involved the type of misconduct at which" the prohibitions in question are directed (*Matter of Primus,* 436 US 412, 434, *supra*).

standards (as distinct from the traditions of the profession, cf. *Bates, supra,* at p. 371) and direct mail advertising of the nature and cost of legal services offered is too indirect to sustain proscription of such advertising (cf. *Central Hudson Gas, supra,* 447 US, at p —, 100 S Ct, at p 2350; *Terry* v. *California State Bd. of Pharmacy,* 395 F Supp 94, 106, affd 426 US 913). The more so is this true in light of *Bates'* conclusions that "competition through advertising is ordinarily the desired norm" (at p 378, n 35) and that restraints on advertising "are an ineffective way of deterring shoddy work" (at p 378).

Invasion of privacy and the possibility of overbearing persuasion, both of which were condemned in *Ohralik* and which could conceivably be present in telephone solicitation as the Appellate Division suggests (70 AD2d, at p 273), are not sufficiently possible in mail solicitation to justify banning it. As the Supreme Court put it in *Consolidated Edison Co.* v. *Public Serv. Comm.* (447 US —, —, 100 S Ct 2326, 2336), a recipient of a lawyer's letter "may escape exposure to objectionable material simply by transferring * * * [it] from envelope to wastebasket." It is not enough to justify a ban that in some situations (marital discord, a death in the family) a solicitation letter may be offensive to the recipient, or that some people may fear receiving a lawyer's letter, or to suggest that there may be some who by reason of frequent receipt of lawyers' solicitation letters may discard without opening a mailed summons.

The potential for deception is a different matter, for unlike newspaper, television or radio advertising, direct mail goes only to the addressee. The temptation for deception is, therefore, greater, and the probability of exposure less, than for those more public media. Enforcement of the State's strong interest that "the stream of commercial information flow cleanly as well as freely" (*Virginia*

Pharmacy Bd. v. *Virginia Consumer Council,* 425 US 748, 772) and that, to that end, there be effective oversight of members of the Bar is less probable, therefore, with respect to mail than to media advertising (see *Ohralik,* 436 US 447, 466-467, *supra; Allison* v. *Louisiana State Bar Assn.,* 362 So 2d 489, 496 [La]).

That there is a substantial State interest to which the regulations are closely related does not end the inquiry, however, for complete suppression is not constitutional if the State's interest can be adequately protected by more limited regulation. That is can be seems hardly open to question, in view, for example, of the filing requirement for retainer statements now contained in the Appellate Division's rule 691.20 (22 NYCRR 691.20). That similar filing of a solicitation letter assures the public ample protection was the conclusion of the Supreme Court of Kentucky (*Kentucky Bar Assn.* v. *Stuart,* 568 SW2d 933, 934 [Ky], *supra*).[6]

Our discussion so far assumes that the ban against solicitation is a restriction as to content or subject matter, rather than manner of communication. The Supreme Court has, however, differentiated between th two applying the criteria discussed above to content restriction but upholding a regulation of time, place or manner if reasonable, if it serves a significant governmental interest and if it leaves ample alternative channels for communication (*Consolidated Edison Co.* v. *Public Serv. Comm.,* 447 US —, —, 100 S Ct 2326, 2332, *supra; Virginia Pharmacy Bd.* v. *Virginia Consumer Council,* 425 US 748, 771, *supra*),

Since that categorization gives rise to some problems in analysis (c. Reich, Preventing Deception In Commercial

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[6] Our discussion of a filing requirement is, of course, by way of example only and not by way of prescription.

Speech, 54 NYU LR 775), we note that the result would not differ were to apply the manner rather than the content criteria. The Committee argues that "ample alternative channels" are left open because nothing in the letter, with the exception of the personal references, was unsuited to communication in a newspaper, magazine, advertising supplement, telephone directory, radio or television advertisement. There is, however, nothing to show what the comparative costs of the suggested alternatives is or whether the more direct and discursive letter form is not more effective, and thus no basis for concluding that the alternatives are "ample". There is, moreover, respondent Koffler's testimony that at least the newspaper advertising which they tried first was ineffectual, the response being negligible, whereas they were retained for some 200 closings as a result of their letter to homeowners. Moreover, unless the reasonablenss of regulation is to be considered in the abstract, a regulation which completely proscribes use of direct mail when the State's purpose can readily be achieved by a less restrictive alternative cannot be said to be reasonable.

Whether considered as a restriction on the content of, or a regulation of the manner of, commercial speech, the restrictions in question may not constitutionally proscribe direct mail advertising of the availability of particular legal services and the cost of those services.

For the foregoing reasons, the order of the Appellate Division should be reversed, without costs, and the proceeding dismissed.

Chief Judge Cooke and Judges JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG concur.

Order reversed, etc.

APPENDIX B

ALFRED S. KOFFLER
&
WILLIAM HENRY HARRISON, JR.
LAWYERS

670 Main Street
Islip, New York 11751
(days)
61 Randall Road
Shoreham, New York 11786
516-744-4444
(weekends & after 9:00 pm)

Real Estate
Closings
$235
INCL
Contracts
516-581-6000 days
516-744-444 even
WILLIAM H. HARRISON
Lawyer

August 23, 1977

Dear Howeonwer (sic)

The advertisement shown above is being run by our office in "Newday's" real estate section.

We understand that you are selling your home and we would like to take this opportunity to inform you that because we are now allowed to advertise our services YOU no longer need to pay $400.00 to $600.00 for legal representation when you close title.

IN FACT, BECAUSE WE ARE ABLE TO CONTACT YOU BY DIRECT MAIL, WE ARE WILLING TO TRANSACT AND REPRESENT YOU AT THE SALE OF YOUR PROPERTY FOR $195.00.

Appendix B.

Feel free to contact us if you have any questions.

If you wish, you may make an appointment with us prior to selling your house. This will unable us to draw your contracts quickly when you and a purchaser come to terms. Enclosed you will find our business card. We look forward to representing you.

Very truly yours,

A. S. Koffler
Alfred S. Koffler

William Henry Harrison, Jr.
William Henry Harrison, Jr.

Appendix B.

ALFRED S. KOFFLER
&
WILLIAM HENRY HARRISON, JR.
LAWYERS

670 Main Street
Islip, New York 11751
516-581-6000
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Real Estate
Closings
$235
INCL
Contracts
516-581-6000 days
516-744-444 even
WILLIAM H. HARRISON
Lawyer

August 23, 1977

Dear Broker:

The advertisement shown above is being run by our office in "Newsday."

We think you will agree that the fee of $235.00 is very competitive, NEVERTHELESS, WE ARE NOW HAPPY TO ADVISE THAT OUR FEE TO ALL BROKER-REFERRED CLIENTS WILL BE $195.00, REGARDLESS OF THE PURCHASE PRICE OF THE PROPERTY.

Appendix B.

We are proud that we are able to decrease the cost of this aspect of home-ownership at a time when Long Islanders are finding it increasingly expensive and difficult in many ways to own their own home.

Enclosed are two of our business cards. Our principal office is at 670 Main Street, Islip, New York, however, we also have facilities at 61 Randall Road, Shoreham. We can be contacted in Islip at 581-6000 during normal business hours or in Shoreham at 744-4444 after 9:00 P.M. and on weekends.

We look forward to assisting you by assisting your clients.

Very truly yours,

A. S. KOFFLER
Alfred S. Koffler

WILLIAM HENRY HARRISON, JR.
William Henry Harrison, Jr.

No. 80-1222

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE, TENTH JUDICIAL DISTRICT,

Petitioner,

—v.—

ALFRED KOFFLER and WILLIAM HENRY HARRISON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

MELVIN L. WULF
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Attorney for Respondents

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In The
Supreme Court of the United States

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE
TENTH JUDICIAL DISTRICT

Petitioner,

-v-

ALFRED KOFFLER and WILLIAM HENRY HARRISON, JR.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Alfred S. Koffler received a BA degree from Brown University in 1949, and his LLB, now a JD, from Harvard Law School in 1952. He was admitted to the New York Bar in 1953. He has practiced in Islip, NY for 23 years. Mr. Koffler served in the Navy from 1944 to 1946. He was elected to the post of Justice of the Peace in the Town of Islip in 1959 and served as Justice until September 1963, when he resigned

to run for Supervisor of the Town (A. 9-10).*/

Respondent William Henry Harrison, Jr., received a BS degree from Michigan State University in 1971, and his law degree from the University of Virginia Law School in 1975. He was admitted to the New York Bar in 1976. He began a clerkship with Mr. Koffler in February, and joined him in partnership in August 1977 (A. 26-27).

The firm is engaged in a general practice, including real estate, matrimonial, negligence and criminal law (A. 11).

Prior to the decision of this Court in Bates v. State of Arizona, in June 1977, neither respondent had ever engaged in any advertising

*/ The symbol "A" refers to the Appendix filed by Respondents in the New York State Court of Appeals.

to promote their legal practice (A. 12-13, 27). When Bates was handed down, the respondents studied the decision and very carefully considered how it might apply to their practice. They believed that advertising might allow them to lower the cost to clients of some standardized legal procedures. Specifically, based upon Mr. Koffler's twenty-three or four years of experience in the field, they believed that title closings could be handled efficiently on a large scale at reduced cost (A. 13-15).

The customary lawyer's fee for title closings in Suffolk County was about one percent of the purchase price of a house or commercial property. That was Mr. Koffler's customary fee, though he charged a minimum fee of $275 regardless of the sale price (A. 16).

The average sale price of a home in Suffolk County was probably about $45,000 (A. 15).

Acting on their belief, the firm, in early August 1977, placed an advertisement in Newsday, a daily newspaper of large circulation in Suffolk and Nassau Counties, offering their services in real estate closings for a fee of $235 regardless of the price of the house. The results were negligible (A. 15). They then considered that if the advertising could be directed specifically to those interested in the sale of a house, the results would improve. As a result of that judgment, the letters at issue in this case were mailed out (A. 17-18). In the period August 24, 1977 to October 24, 1977, respondents mailed out about 7500 letters to homeowners in Suffolk County on their

legal stationery, and several hundred to real estate brokers (A. 19-20).*/

After sending out the letters, the respondents took no further action to contact or communicate with any of the persons to whom the letters were addressed (A. 20-21). They merely waited for replies (A. 20-21).

The replies which were received came entirely by phone (A. 21). Upon receipt of such a call, further information was provided, if requested (A. 22-23), or an appointment was made, and the caller was instructed to bring along the necessary documents, including surveys, deeds, mortgages, certificates of occupancy, and fire underwriting certificates. At the meeting, respondents

*/ Respondents received no complaints from any recipients of the letter. To the contrary, those who called expressed pleasure at the lower fee (A. 20).

would explain their services and ask the client to sign a retainer form, which indicated the services to be performed and the amount of the fee. If the firm was retained, respondents would accept one-half the fee at that time, and the remainder upon the closing (A. 22). If the firm was not retained after the initial meeting, no fee was charged (A. 23).

As a result of the letters, the firm participated in about 200 closings at the $195 fee (A. 24). Though the fee was raised to $235 in January 1978, the firm would only charge $195 to anyone who might come into the office with the August 1977 letter. In fact, that happened only the week prior to the instant hearing, and the client was charged $195 (A. 24-25).

The Appellate Division

unanimously concluded that the respondents' direct-mail advertising could be prohibited, finding two compelling interests which it asserted were sufficient to overcome respondents' First Amendment rights: that the letters invaded the recipients' privacy; and that they "unduly commercialize[d] the legal profession" (A. 65).*/

The New York Court of Appeals unanimously reversed. As to the letters sent to homeowners, it held, based upon the analysis of Bates v. Arizona, 433 U.S. 350 (1977) and Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), that mail advertising by lawyers presented no potential for invasion of privacy, overcommercialization, or conflict of interest (Pet. A. 9) and

*/ The Appellate Division opinion is reported at 70 A.D. 2d 252, 420 N.Y.S. 2d 560.

that as to potential deception, complete suppression violated the First Amendment, since the State's interest "can be adequately protected by more limited regulation" (Pet. A 11). The Court chose to leave consideration of respondents' letters to real estate brokers to another day (Pet. A 4).

CERTIORARI SHOULD BE DENIED

Certiorari should be denied in this case because the New York Court of Appeals, though deciding an important constitutional question, has decided it in complete harmony with applicable decisions of this Court.

Bates v. Arizona, supra., Ohralik v. Ohio State Bar Assn., supra, and In Re Primus, 436 U.S. 412 (1978), read together, require the conclusion that the

respondents' mail advertising is protected commercial speech. Though Bates and Ohralik did not, of course, concern mail advertising, their holdings are readily applicable to this case. Particularly, as Mr. Justice Powell noted in Bates, 433 U.S. at 402, n. 12, as "no distinctions can be drawn between newspapers...and mail circulations."

The valid state interests considered in Bates and Ohralik, included all of those, except invasion of privacy, which were considered by The New York Court of Appeals. See Bates, 433 U.S. at 366, 368-369, 379; Ohralik, 436 U.S. at 461, 464-465. As between the newspaper advertising involved in Bates , and the face-to-face solicitation of recently injured individuals under stressful circumstances involved in Ohralik, it is perfectly clear that advertising by mail is

the perfect equivalent of advertising by newspaper, and shares none of the characteristics of face-to-face solicitation. The effort to draw any equation between mail advertising and Ohralik-type solicitation is baseless and defies common sense, as the New York Court of Appeals recognized (Pet. A 10). As for invasion of recipients' privacy, it was explicitly held in In Re Primus, supra at 435, that a letter of solicitation from a lawyer to a prospective client "involve[s] no appreciable invasion of privacy." Receipt of a letter is to be contrasted, again, with face-to-face solicitation which, as noted in Ohralik, supra at 465, "may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy." The Court contrasted that kind of event with that of "the reader of an advertise-

ment who can effectively avoid further bombardment of his sensibilities by simply averting his eyes..." id, at 465 n. 25, or by disposing of a letter in a trash basket.

We will not belabor further what we believe is the perfectly obvious fact that there can be no rational distinction drawn between newspaper and mail advertising, and that the decision below is analytically indistinguishable from Bates. The Court ought not expend its scarce resources by granting certiorari in this case. The existence of an arguably contrary opinion in a single State, Allison v. Louisiana State Bar, 362 So. 2d 489 (1978), is insufficient reason to grant certiorari where that decision is clearly wrong, where the highest court of another state has upheld mail advertising, Kentucky Bar Association

v. Stuart and Thompson, 568 S.W. 2d 933 (1978), and where the trend to mail advertising in the legal profession is irresistable, as demonstrated by the proposal of The ABA Commission on Evaluation of Professional Standards Model Rules of Professional Conduct (Jan. 30, 1980), in which Proposed Rule 9.2 would explicitly permit advertising by "general direct mailing."

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,

Melvin L. Wulf
Clark Wulf Levine & Peratis
113 University Place
New York, NY 10003
(212) 475-3232

Attorney for Respondents

February 1981